92-428

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

STANLEY V. GRAFF,
Petitioner,

VS.

BANK ONE, TEXAS, N.A. (f/k/a Deposit Insurance Bridge Bank, N.A.), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A., and FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBank Dallas, N.A.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; IMPORTANT QUESTION TO BE DECIDED BY THIS COURT; DUE PROCESS

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and Section 1823(e) and thereby eliminate a bona fide fact issue related to the payment of interest on Graff's loan? .24

QUESTION 2 -- DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the District Court recognize and then improperly obliterate the fact issue created by MBank's efforts to wrongfully pressure Graff's father and did the Court of Appeals thereafter err in denying the existence of the very same fact issue expressly recognized by the District Court? 37

QUESTION 3 --- CONFLICT WITH ANOTHER FEDERAL COURT OF APPEALS; DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the Court of Appeals improperly rely on tainted affidavits to eliminate fact issues and thus pave the way for the case to be decided by summary judgment rather than by trial? 45

PARTIES TO THE PROCEEDING

1. Bank One, Texas, N.A. (f/k/a Deposit Insurance Bridge Bank, N.A.), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A.

2. Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A.

3. Stanley V. Graff

4. William Frank Carroll of the law firm of Donahoe, Jameson & Carroll in Dallas, Texas.

5. Ann S. DuRoss, Assistant General Counsel, Richard J. Osterman, Jr., Senior Counsel, and Jerome A. Madden, Counsel for Federal Deposit Insurance Corporation in Washington, D.C.

6. Patricia Chalbeck for Federal Deposit Insurance Corporation in Dallas, Texas.

7. Robert J. Clary of the law firm of Owens, Clary & Aiken, L.L.P. in Dallas, Texas.

8. Tom Thomas and Kristin A. Nilsson of the law firm of Kolodey & Thomas in Dallas, Texas.

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OPINIONS DELIVERED IN THE CASE

This petition seeks to appeal the May 15, 1992, decision of Circuit Judges Garwood and DeMoss and District Judge Schwartz sitting for the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division.[1] The judgment of the district court is embodied in the final judgment and the amended final judgment signed by the Honorable Robert W. Porter

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[1] A copy of the May 15, 1992, opinion of the Fifth Circuit is included in Appendix as Exhibit "A".

on July 23, 1991, and July 26, 1991, respectively.[2]

STATEMENT OF JURISDICTION

Graff requests that this Court review the judgment of the United States Court of Appeals for the Fifth Circuit, filed on May 15, 1992. Graff's Petition for Rehearing was denied by the Fifth Circuit on June 11, 1992.[3] This Court

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[2] Copies of the September 18, 1989, Interlocutory Summary Judgment, the July 23, 1991, Final Judgment and the July 26, 1991, Amended Final Judgment are included in Appendix as Exhibits "B", "C", and "D", respectively.

[3] A copy of the June 11, 1992, denial of Graff's Petition for Rehearing is included in Appendix as Exhibit "E".

has jurisdiction under 28 U.S.C. § 1254 in that Section 1254(1) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court ... [b]y writ of certiorari granted upon the petition of any party to any civil ... case ... after rendition of judgment or decree ...."[4]

FEDERAL STATUTES INVOLVED

In compliance with Rule 14 of the Supreme Court Rules, the text of the relevant Constitutional provisions and federal statues are as fcllows:

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous

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[4] 28 U.S.C.A. § 1254 (Supp. 1992).

crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VII:

In Suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

12 U.S.C.A. § 1819(b)(2)(B) (Supp. 1992):

(B) REMOVAL

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

12 U.S.C.A. § 1821(n)(4)(I) (1989):

Each bridge bank chartered under this subsection shall have all corporate

powers of, and be subject to the same provisions of law as, a national bank, except that - no agreement which tends to diminish or defeat the right, title or interest of a bridge bank in any asset of an insured bank in default acquired by it shall be valid against the bridge bank unless such agreement -

(i) is in writing,

(ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by such insured bank in default,

(iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval

shall be reflected in the minutes of said board or committee, and

(iv) has been, continuously from the time of its execution, an official record of such insured bank in default.

12 U.S.C.A. § 1823(e) (1989):

No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement --

(1) is in writing,

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including

the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

28 U.S.C.A. § 1254(1) (Supp. 1992):

COURT OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any

civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C.A. § 1291 (Supp. 1992):

FINAL DECISIONS OF DISTRICT COURTS

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.A. 1441(b) (1973):

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

FED. R. CIV. P. 56(a)-(d) (1982 & Supp. 1992):

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory

judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

STATEMENT OF THE CASE

Plaintiff MBank Dallas, N.A. ("MBank") filed suit in Texas state court on January 11, 1989, against Graff to recover the unpaid principal and accrued interest on a written promissory note, as modified, plus attorneys' fees.[5] On or about March 28, 1989, the Comptroller of the Currency declared MBank insolvent and appointed the Federal Deposit Insurance Corporation as Receiver for MBank (the "FDIC-Receiver").[6] On June 26, 1989, Deposit Insurance Bridge Bank, N.A., as assignee of the FDIC-Receiver, intervened.[7] Bank One, as Assignee of the

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[5] Record on Appeal, V. 1: 005-046.

[6] Record on Appeal, V. 1: 002.

[7] Record on Appeal, V. 1: 052-054.

FDIC-Receiver, and the FDIC-Receiver removed the action to federal court on September 19, 1989.[8] Plaintiffs premised removal of the state court case to federal court on 12 U.S.C.A. § 1819 and 28 U.S.C.A. § 1441(b) which provide for removal of a cause of action without regard for the citizenship or residence of the parties.

In various pleadings, Plaintiff[9] alleges that on or about April 22, 1985, Graff executed a secured promissory note

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[8] Record on Appeal, V. 1: 001.

[9] The term "Plaintiff" refers to the initial plaintiff, MBank Dallas, N.A., and its successors in interest depending on which entity was the party plaintiff at the time the relevant pleading was filed.

to MBank Grand Prairie in the principal sum of $4,050,000.00, plus interest.[10] Plaintiff further alleges that the parties subsequently renewed, modified, and extended the note through a series of agreements.[11]

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[10] Record on Appeal, V. 1: 006. A copy of the referenced note is attached as Exhibit "A-1" to the Affidavit of Ron Tomlin in Support of Plaintiff's Motion for Summary Judgment ("Tomlin Affidavit"). Record on Appeal, V. 1: 079.

[11] Record on Appeal, V. 1: 006-007. A copy of the final renewal and extension agreement is attached as Exhibit "A-2" to the Tomlin Affidavit. Record on Appeal, V. 1: 080-084.

Plaintiff alleges that Graff did not make the principal payment or interest payment due on July 20, 1988.[12] Thus, Plaintiff claims that Graff is in default.[13] Plaintiff states that despite Plaintiff's demand[14] for payment, Graff failed and refused and continues to fail and refuse to pay the principal and accrued interest due on the modified note.[15] Plaintiff alleges that it

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[12] Record on Appeal, V. 1: 007.

[13] Record on Appeal, V. 1: 007, 070.

[14] A copy of the demand made upon Graff is attached as Exhibit "A-3" tc the Tomlin Affidavit. Record on Appeal, V. 1: 085-086.

[15] Record on Appeal, V. 1: 007.

therefore accelerated the indebtedness.[16]

Plaintiff MBank initially claimed that it is the owner and holder of the note in question.[17] Subsequently, Bridge Bank, and thereafter Bank One, asserted that it acquired the note and extension agreement from the FDIC-Receiver through a Purchase and Assumption Agreement dated March 28, 1989, and that Bridge Bank, and thereafter Bank One, is the present legal owner, holder, and possessor of the note and extension agreement in question.[18]

Graff, on the other hand, alleges that MBank instructed him not to pay interest on the note at one point in time and further alleges that Bridge Bank or

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16 Record on Appeal, V. 1: 077.

17 Record on Appeal, V. 1: 008.

18 Record on Appeal, V. 1: 070.

its assignor, MBank, and/or FDIC-Receiver contacted relatives of Graff not liable as debtors or guarantors on the debt in question concerning the alleged indebtedness as well as the financial condition of Graff.[19] Graff asserts that such conduct amounts to a waiver of Bank One's right to collect interest, unfair debt collection practices, and violations of the Texas Deceptive Trade Practices Act for which Graff is entitled to damages and additionally, that because of such conduct, Plaintiff has waived and is estopped from recovering the debt and accrued interest which it seeks by this litigation.[20]

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[19] Record on Appeal, V. 1: 108-114, 119, 123.

[20] Record on Appeal, V. 1: 119.

Based on the foregoing allegations, Plaintiff filed its motion for summary judgment asserting that no genuine issue exists as to any material fact and that it was therefore entitled to judgment as a matter of law.[21] Judge Brooks, sitting for the 95th Judicial District Court, granted an Interlocutory Summary Judgment on September 18, 1989, notwithstanding Graff's claims of waiver and estoppel and ordered that Bank One recover principal and interest from Graff in the sum of $4,022,738.00 and $638,645.62, respectively, plus reasonable attorneys' fees in the amount of $8,250.00.[22]

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[21] Record on Appeal, V. 1: 068-074.

[22] Record on Appeal, V. 1: 126-130.

On May 1, 1990, Plaintiff filed its motion for summary judgment against Graff's counterclaim for unfair debt collection practices, deceptive trade practices, and attorneys' fees.[23] The Court rendered a Memorandum Opinion and Order Granting Summary Judgment on June 18, 1991, in favor of Plaintiffs as to all claims asserted by Graff.[24] On July 23 and 26, 1991, the Court entered a Final Judgment and an Amended Final Judgment, respectively, incorporating both its summary judgment decisions. Graff appealed to the Fifth Circuit from that final judgment.

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[23] Record on Appeal, V. 1: 146-152.

[24] Record on Appeal, V. 2: 364-372.

For significantly different reasons than articulated by the District Court, the Fifth Circuit affirmed the District Court's judgment. Graff contends that the Fifth Circuit's decision is directly contrary to the decision of the trial court in several material respects and, more importantly, is directly against the case authority set forth by various other federal circuit courts.

BASIS FOR FEDERAL JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C.A. § 1291 in an appeal from a final judgment of the United States District Court for the Northern District of Texas, Dallas Division.

The United States District Court for the Northern District of Texas, Dallas Division, had jurisdiction following removal of this action from the State court by Bank One and the FDIC-Receiver on September 19, 1989, pursuant to 12 U.S.C.A. § 1819 and 28 U.S.C.A. § 1441(b).

ARGUMENT AND AUTHORITY
ALLOWING THE WRIT OF CERTIORARI

QUESTION 1 --- DEPARTURE FROM ACCEPTED AND USUAL COURSE;IMPORTANT QUESTION TO BE DECIDED BY THIS COURT; DUE PROCESS

Did the Court of Appeals improperly extend the protection of D'Oench, Duhme and Section 1823(e) and thereby eliminate a bona fide fact issue related to the payment of interest on Graff's loan?

The over-burdened federal judiciary has responded unfairly to pressures arising from a growing flood of litigation which resulted from the glut of poorly managed banks and savings and loans. The courts have used the doctrine of D'Oench, Duhme,[25] 12 U.S.C.A. § 1823(e), and the concept of "public

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[25] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

policy" to effectively eliminate a borrower's affirmative claims and defenses against any insolvent bank as well as its successor entities. The federal judiciary has essentially adopted, knowingly or unknowingly, an unstated federal policy to lessen the number of jury trials by D'Oenching borrowers' bona fide fact issues through the use of quick and easy summary judgments. Although bankers and regulators share portions of the blame for the poorly managed banks, only the borrowers are singled out for D'Oenching. This case demonstrates that the expansion of these policies against borrowers has now gone too far. The unwarranted extension preempts Graff's ability to obtain a trial on the merits of the case and

thereby violates his Article Five and Article Seven rights to due process by depriving him of property without a trial by jury.[26] This Court must restrict application of D'Oench, Duhme and Section 1823(e) to appropriate circumstances.

D'Oench, Duhme protects the FDIC and Bank One only against the enforcement of secret side agreements which enable the maker of a note to take advantage of an undisclosed and fraudulent arrangement on the idea that the maker has "lent himself" to a scheme which tends to deceive

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[26] U.S. Const. amend. V; U.S. Const. amend. VII; see also Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1335-36 (1990) (emphasizing a litigant's right to a trial by jury).

banking authorities.[27] Likewise, Section 1823(e) precludes enforcement of an agreement unless it is (i) in writing, (ii) executed by the bank contemporaneously with the bank's acquisition of the asset, (iii) approved by the board of directors of the bank, and (iv) contained in the official bank records from the time of its execution.[28] The present case is a classic example of how the

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[27] D'Oench, Duhme, 315 U.S. at 461.

[28] 12 U.S.C.A. § 1823(e). Section 1821(n)(4)(I) essentially reads the same except that it expressly applies to bridge banks. Because of the virtual identical nature of the two statutes, they will be collectively referred to as "Section 1823(e)" herein.

D'Oench, Duhme doctrine and Section 1823(e) have been extended far beyond the realm that was originally contemplated by the judiciary or the legislature. Here, the Court of Appeals has transformed an express, direct instruction from a banking officer to a borrower into an "agreement" whose enforcement is allegedly barred by the public policy enunciated in D'Oench, Duhme and Section 1823(e).

Graff states in his affidavit that he had ongoing discussions with MBank personnel regarding his debt obligation to MBank.[29] Graff further swears that although he attempted to continue paying interest on the note in question, MBank

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[29] Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 121.

loan officers expressly instructed him to cease paying interest on the note.[30] It is this directive by MBank representatives upon which Graff bases his affirmative defenses of waiver and estoppel. It is also this directive by MBank representatives that the Court of Appeals determined was an "agreement" whose enforcement is precluded both by D'Oench, Duhme and by Section 1823(e). This ruling exceeds the accepted and usual course of judicial proceedings by going beyond what all other courts have determined to be an "agreement" subject to D'Oench, Duhme and Section 1823(e).

Here, the basic policy considerations of D'Oench, Duhme and Section

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[30] Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 122.

1823(e) do not apply because there is no arrangement or agreement which understated the value of the insolvent bank's assets and thereby deceived banking authorities.[31] First, because the loan officers did not specify the length of time such forbearance was to continue, the Court of Appeals' conclusion that ". . . a note without interest is less valuable than a note with interest" is without support. The bank's directive did not obliterate the interest obligation contained within the express terms of the note. Rather, the note necessar-

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[31] See D'Oench, Duhme, 315 U.S. at 461 (holding that the doctrine precludes enforcement of secret side agreements involving schemes which tend to deceive banking authorities).

ily continues to contain an obligation to pay interest and MBank's directive simply specified non-payment of interest for an unstated period of time.

More importantly, there is no "agreement" involved here which invokes the protections of D'Oench, Duhme or Section 1823(e). Through judicial alchemy, the Court of Appeals improperly converts the unilateral, temporary instruction from a loan officer to Graff into an "agreement".[32] Once the Court of

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[32] Moreover, a major gap in proof by the FDIC-Receiver and Bank One occurs because both of those institutions fail to address this important issue in their affidavits despite the fact that Graff swears in his affidavit that MBank personnel "instructed" him not to pay

Appeals transformed the instruction into an "agreement", the Court used D'Oench, Duhme to obscure and eventually obliterate the existence of a bona fide fact issue. While no one questions a court's right to lawfully invoke the doctrine, a court cannot be allowed the unfettered discretion to invoke the doctrine in any and all circumstances, regardless of whether the requisite elements for application of the doctrine have been satisfied.

Even previous extensions of D'Oench, Duhme and Section 1823(e) do not support enlarging the application of the doctrine or statute to the present case. In fact, despite the extensions recognized in a

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interest on the note.

number of cases to date,[33] the ruling in

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[33] See e.g., FSLIC v. Griffin, 935 F.2d 691, 697 (5th Cir. 1991), cert. denied, 112 S. Ct. 1163 (1992) (court held that Griffin's defense based on a breach of agreement to fund was precluded by D'Oench, Duhme and § 1823(e)); Union Federal Bank of Indianapolis v. Minyard, 919 F.2d 335, 336 (5th Cir. 1990) (wherein the court held that D'Oench, Duhme precluded venturers' claim of usury that was not reflected in lender's records); Bowen v. FDIC, 915 F.2d 1013, 1015-17 (5th Cir. 1990) (wherein court held that claims that bank breached oral promise to extend loan were precluded by D'Oench, Duhme rule); Bell & Murphy and Assoc., Inc. v. Interfirst Bank Gateway, N.A., 894 F.2d 750, 753 (5th Cir.), cert.

this case far exceeds all prior extensions of both the doctrine and Section 1823(e). Neither the FDIC-Receiver nor Bank One have cited even one case in which the protections afforded by D'Oench, Duhme and Section 1823(e) have been extended to the express, unilateral instruction of a bank. Here, the lower court has proceeded beyond prior case law and has extended the protections too far, thereby depriving Graff of fundamental rights. The existence and effect of the bank's directive are not "matters of law"

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denied, 111 S. Ct. 244 (1990) (wherein court held that agreement whereby customer was to surrender accounts receivable and certain funds and bank was to extend loan and honor overdrafts was unenforceable under D'Oench, Duhme).

and should not be decided in a summary judgment proceeding. The Court of Appeals cannot be allowed to create, and then legitimize, a fictitious agreement which destroys a litigant's right to have a jury decide the relevant fact issues. This Court needs to inform the lower courts that the protections afforded to the FDIC-Receiver or its successor entities have limits. Moreover, this Court needs to emphatically enforce those limits when a lower court proceeds too far.

Additionally, the principles of Section 1823(e) are not available to protect Bank One.[34] The Court of Appeals

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[34] Bank One is essentially the "bridge bank" in this case because the change from Deposit Insurance Bridge Bank

repeatedly cites 12 U.S.C.A. § 1821[35] even though the statutory provision was not yet enacted and thus the protection was not yet available to a "bridge bank" at the time of the allegedly wrongful conduct by MBank.[36] Significantly, the statute does not contain any provision for retroactive application.

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was merely a change of name.

[35] Section 1821(n)(4)(I) expressly extended the protection of Section 1823(e) to "bridge banks."

[36] Pub. L. 101-73, which added subsection (n) to Section 1821, was enacted on August 9, 1989.

QUESTION 2 --- DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the District Court recognize and then improperly obliterate the fact issue created by MBank's efforts to wrongfully pressure Graff's father and did the Court of Appeals thereafter err in denying the existence of the very same fact issue recognized by the District Court?

Graff asserted as an affirmative defense and by way of counterclaim that MBank wrongfully attempted to collect on the note in question through contacts with his father.[37] The trial judge clearly identified a fact issue with

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[37] See First Amended Original Answer, Original Counterclaim and Third-Party Petition, included in the Appendix as Exhibit "F".

respect to the wrongful collection practices of MBank by stating that:

> While a genuine, disputed issue of fact is presented in this case regarding whether MBank personnel engaged in unfair debt collection practices, the Court concludes, in light of the case law discussed above, that this fact issue is immaterial under the applicable law. Even if proven, Graff's claim of unfair debt collection practices by the plaintiffs is barred as a defense to his liability on the note by D'Oench, Duhme and its progeny.[38]

The fact issue arose from the pressure that MBank personnel wrongfully placed on Graff's father. Graff states in his affidavit that he saw MBank

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[38] Memorandum Opinion and Order Granting Summary Judgment, p. 7 (emphasis added), included in the Appendix as Exhibit "G".

personnel in a meeting with his father at his father's office and such personnel threatened Graff's father with legal action and attempted to pressure Graff's father into paying off the debt.[39] Graff further testifies that when he subsequently confronted MBank personnel with this conduct, MBank admitted that, without Graff's knowledge, they were attempting to have Graff's father pay off the debt in question.[40] Such a statement is clearly an admission against interest.[41] Graff's father is neither a

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[39] Affidavit of Stanley V. Graff, ¶ 4, pp. 3-4. Record on Appeal, V. 1: 123-24.

[40] Id.

[41] See Fed. R. Civ. Evid. 801(d)(2).

primary obligor of the debt nor a guarantor.[42] Consequently, the trial judge recognized the existence of a fact issue with respect to that conduct, but then held that any cause of action based on that conduct was precluded "by D'Oench, Duhme and its progeny." Upon its review, the Fifth Circuit did not follow the District Court's ruling but instead ruled that Graff's claim for unfair debt collection practices could not survive summary judgment based on the factual evidence before the Court.

First and foremost, D'Oench, Duhme and Section 1823(e) are once again inapplicable for the same reasons set

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[42] Id.

forth above.[43] Graff's claims for wrongful collection practices arise from the affirmative, unilateral, tortious conduct of MBank which occurred after the execution of the note in question and without any participation, acquiescence, involvement, or prior knowledge on the part of Graff. Rather, the tortious collection efforts by MBank occurred separate and apart from Graff's obligations under the terms of the note in question. Accordingly, there is simply no "secret side agreement" involved whose enforcement is precluded

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[43] Graff hereby incorporates his argument and authority relating to D'Oench, Duhme and 12 U.S.C.A. §§ 1821(n)(4)(I) and 1823(e) as set forth in Question 1 herein.

by either D'Oench, Duhme or Section 1823(e). The trial court's ruling based on an erroneous application of D'Oench, Duhme and Section 1823(e) departs from the accepted and usual course of judicial proceeding and deprives Graff of his fundamental rights to due process and a trial by jury.

Moreover, the Fifth Circuit based its holding on the fact that MBank was not attempting to collect the debt of "another" at the time of the wrongful practices, and thus was not a "debt collector" subject to the provisions of the Fair Debt Collection Practices Act.[44] This finding is necessarily premised on proof that MBank was the "owner" of the note in question at the time that it

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[44] 15 U.S.C.A. § 1692 et seq.

attempted to collect the amount due from Graff's father. The affidavits submitted by the FDIC and Bank One cannot and do not provide such proof. The summary judgment proof submitted to the District Court wholly fails to establish at what point in time, if at all, the promissory note executed to MBank Grand Prairie became the property of MBank Dallas, N.A.[45] Once again, the lower courts' ruling, based on substantively deficient affidavits, directly resulted in the summary judgment against Graff and thereby violates Graff's constitutional

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[45] See infra notes 58-59 and corresponding text for discussion and case authority as to the requirements for proving ownership of a promissory note.

rights to due process through a trial by jury.[46]

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[46] U.S. Const. amend. V; U.S. Const. amend. VII; see also Lytle v. Household Mfg., Inc., 110 S. Ct. 1331, 1335-36 (1990) (emphasizing a litigant's right to a trial by jury).

QUESTION 3 --- CONFLICT WITH ANOTHER FEDERAL COURT OF APPEALS; DEPARTURE FROM ACCEPTED AND USUAL COURSE; DUE PROCESS

Did the Court of Appeals improperly rely on tainted affidavits to eliminate fact issues and thus pave the way for the case to be decided by summary judgment rather than by trial?

In their rulings, both the District Court and the Court of Appeals necessarily rely on the affidavits of David Eisenstark[47] and Ron Tomlin.[48] However, the opinion of the Court of Appeals fails to address Graff's contention that the FDIC's and Bank One's affidavits are deficient and fails to address the

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[47] Record on Appeal, V. 1: 188-189.

[48] Record on Appeal, V. 1: 190-192.

District Court's adjudication of that issue. The failure to address the issue occurred despite Graff's specific assignment of error to the use of, and reliance on, the substantively deficient affidavits. This silence is a clear departure from the usual and accepted course of judicial review. The issue, once raised, required the Court of Appeals to address it. By failing to do so, the Court of Appeals deprived Graff of his due process rights.[49]

Moreover, a close examination discloses that both of these affidavits contain statements of "personal knowledge" which are insufficient, as a matter of law and logic, to support the conclusions claimed. The conclusions

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[49] U.S. Const. amend. V.

espoused by the affiants simply cannot be supported by the contents of the affidavits. Moreover, the lower courts' cavalier treatment of the deficient affidavits results in the summary judgment rulings against Graff and deprives him of his right to a trial by jury.[50]

In his affidavit, Mr. Eisenstark expressly states that the "facts stated herein are based on my personal knowledge which I acquired as described herein."[51] Mr. Eisenstark then goes on to state that "the FDIC had no reason to, and its representatives did not, contact any of Graff's relatives and/or others not liable as debtors or guarantors on Graff's debt seeking the payment or

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[50] U.S. Const. amend. VII.

[51] Record on Appeal, V. 1: 188.

recovery of Graff's obligations to Bank One . . . ."[52] However, Mr. Eisenstark provides no basis for reaching such a conclusion. Tellingly, Mr. Eisenstark did not swear that he asked each representative of the FDIC-Receiver whether or that representative had contacted any of Graff's relatives. Moreover, Mr. Eisenstark did not swear in his affidavit that he had questioned any of the MBank representatives, such as Bob Bell or Doug Sweeney who were unquestionably involved in Graff's lending relationship with MBank.[53]

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[52] Record on Appeal, V. 1: 189.

[53] See Affidavit of Stanley V. Graff, ¶ 2, p. 2. Record on Appeal, V. 1: 122.

Likewise, Mr. Tomlin also states in his affidavit that "[t]he facts stated herein are based on my personal knowledge which I acquired as stated herein."[54] He then testifies that "[f]rom March 28, 1989 to January, 1990, no BANK ONE agents or representatives contacted any of GRAFF's relatives and/or others not liable as debtors or guarantors on GRAFF's debt regarding the payment or recovery of GRAFF's obligations under the note."[55] Again, Mr. Tomlin cites no basis for reaching this conclusion. Once again, Tomlin did not swear that (i) he asked each and every Bank One representative to swear that they had not contacted any of Graff's relatives and/or others

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[54] Record on Appeal, V. 1: 190.

[55] Record on Appeal, V. 1: 191.

regarding Graff's debt, nor did he (ii) swear that he had asked each MBank agent or representative, including Mr. Bell or Mr. Sweeney, to swear that they had not contacted any of Graff's relatives and/or others about Graff's debt.

Most importantly, regardless of how the lower court ruled on the competency of Eisenstark's and Tomlin's affidavits, neither the FDIC nor Bank One ever located a person who was willing to swear that MBank personnel,[56] particularly Mr. Bell and Mr. Sweeney, had not contacted Mr. Graff's father with respect to

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[56] While Mr. Eisenstark swears to the conduct of the FDIC and Mr. Tomlin swears to the conduct of Bank One, no affiant swears to the conduct or involvement of MBank.

Graff's debt obligation. The failure to obtain such affidavit testimony casts doubt on the value of Eisenstark's and Tomlin's testimony since Graff himself swears that he saw MBank personnel in his father's office. Until such testimony is proffered to the court, the court cannot determine whether or not the conversations between the individuals and Graff's father were "trivial and isolated", insulting, threatening, or offensive. Moreover, all reasonable inferences of fact must be construed in favor of Graff, the party opposing the summary judgment.[57] Thus, even if the summary judgment evidence does not implicate FDIC representatives or Bank One representa-

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[57] Walker v. Sears, Roebuck Co., 853 F.2d 355, 358 (5th Cir. 1988).

tives, the gaps in the affidavits submitted by the FDIC and Bank One unquestionably highlight the significant fact issue relating to the potentially wrongful conduct of MBank personnel.

Additionally, the affidavits filed by the FDIC and Bank One fail to establish a valid transfer of the note in question from its original payee, MBank Grand Prairie, to the successor entities or assignees, and ultimately to Bank One, Texas, N.A. In particular, none of the affidavits support the allegations as to ownership of the note with any documentation whatsoever.[58] In fact, no affiant

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[58] See FDIC as Receiver of Lakeland State Bank Austin, Texas in its Receiver and Corporate Capacities v. Clark, No. 91-8259 (5th Cir. 3/16/92),

ever attempts to prove up the chain of title from MBank Grand Prairie to MBank Dallas, N.A. with competent summary judgment evidence. Because the FDIC and Bank One fail to even attach a copy of the note in question to any affidavit, it is impossible to determine whether or not the note has been endorsed to the FDIC or any other successor entity. Without proof of such endorsement, FDIC, or Bank One, must prove the transaction through which the note was acquired in order to

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958 F.2d 1079 (5th Cir. 1992) (holding that even possession of the original of an unendorsed note payable to the order of another is not alone sufficient or prima facie evidence of ownership or being a holder).

establish ownership,[59] a requirement which both the FDIC and Bank One have failed to satisfy. Moreover, the summary judgment evidence fails to prove that the succession of entities following MBank Dallas, N.A.'s declaration of insolvency have a right to possession or ownership of the note, particularly in light of MBank Dallas, N.A.'s widely known claims that the declaration of insolvency was improper and subject to annulment.

While the Court of Appeals does not even address Graff's contention that the affidavits of Bank One and FDIC-Receiver are legally and substantively deficient,

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[59] See Jernigan v. Bank One, Texas, N.A., 803 S.W.2d 774, 777 (Tex. App. - Houston [14th Dist.] 1991, no writ).

the District Court held that the affidavits were competent evidence within the meaning of Laborers' International Union v. United States Department of Justice.[60] However, that holding is in conflict with numerous other decisions on the same matter. Contrary to the District Court's use of the case, Laborers' International applies to a very limited set of circumstances. It merely holds that an affidavit based upon the affiant's review of a report and his general familiarity with Department of Justice investigations was competent evidence notwithstanding the fact that the affiant did not declare that he took

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[60] 578 F. Supp. 52, 56 (D.C. D.C. 1983), aff'd without opinion, 748 F.2d 714 (D.C. Cir. 1984).

part in the creation of the report in question or that he spoke to those who created the report.[61]

Laborers' International is simply not applicable to the present situation. The affiants, David Eisenstark and Ron Tomlin, make conclusions and assertions with respect to the conduct of all representatives of Bank One and the FDIC, respectively, without supporting those assertions with the basis for that knowledge. Neither Mr. Eisenstark nor Mr. Tomlin state what steps they took to reach their conclusions nor state the basis for their "personal knowledge." Federal courts of appeals repeatedly and consistently require that an affidavit be

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[61] Id. at 53-54.

based on the personal knowledge of a competent affiant.[62]

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[62] See e.g., Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 643 (2d Cir. 1988) (holding that hearsay affidavit is not a substitute for affidavit based on personal knowledge of party and thus will not support motion for summary judgment); Buchanan v. Stanships, Inc., 744 F.2d 1070, 1073 (5th Cir. 1984) (in ruling on summary judgment motion, district court may consider only those allegations that would be admissible in evidence and are made on personal knowledge of affiant); Toro Co. v. Krouse, Kern & Co, Inc., 644 F. Supp. 986, 990 (N.D. Ind. 1986), aff'd, 827 F.2d 155 (7th Cir. 1987) (holding that fact that introductory paragraphs in

The lower courts' failure to critically examine the affidavits submitted in support of the summary judgment ultimately deprived Graff of his fundamental rights to due process and a trial by jury. Because the granting of a summary judgment is such a harsh result, Bank One and the FDIC must be held to the appropriate evidentiary standards. Despite the far-reaching judicial legislation and the over-extension of doctrines such as D'Oench, Duhme, no court has ever held nor has it been legislated that the FDIC and its successor entities are entitled

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affidavits offered in support of summary judgment recite that they are made on personal knowledge will not cure deficiencies in affidavits with respect to showing of personal knowledge).

to a "trial by summary judgment." The FDIC and Bank One are only entitled to a summary judgment once they have met the burdens placed on them by the Federal Rules of Civil Procedure, prevailing case law, and relevant legislation. A summary judgment without the requisite evidentiary proof, as here, deprives Graff of his due process rights and his right to a trial by jury.

CONCLUSION

The incredible extension of D'Oench, Duhme and Section 1823(e) to the present case reaches far beyond logic, reason, or prior case law. This Court must set limits for application of the protections and enforce those limits where necessary to protect the fundamental, constitutional rights of individuals.

Moreover, once a fact issue is created with respect to a particular cause of action, a court cannot decide that issue by summary judgment but must proceed to a trial by jury. It is clear that the summary judgment evidence before the lower courts creates a fact issue as to the wrongful debt collection efforts of MBank. Graff is entitled to prove his cause of action relating to that wrongful

conduct in the setting of a jury trial. His claim in this case is not barred by D'Oench, Duhme or Section 1823(e) just as it cannot be barred through the use of substantively deficient affidavits which are not based on the personal knowledge of the affiants.

WHEREFORE, Petitioner Graff prays that his petition be granted.

Respectfully submitted,

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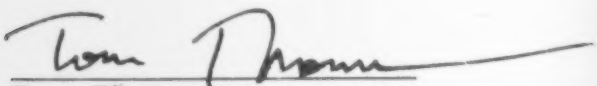
By: 
Tom Thomas
TX Bar No. 19870000

ATTORNEYS FOR PETITIONER
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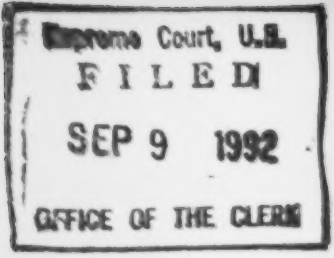

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V. GRAFF

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EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1887

BANK ONE, TEXAS, N.A. (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.) as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBANK DALLAS, N.A., ET AL.

Plaintiffs-Appellees,

VERSUS

STANLEY V. GRAFF,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas (CA3-89-2376-F)

Before GARWOOD, and DeMOSS, Circuit Judges, and SCHWARTZ, District Judge.[1]

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[1] Senior District Judge for the

DeMOSS, Circuit Judge:[2]

I. FACTS AND PROCEDURAL HISTORY

Stanley Graff executed a note to finance a real estate purchase in the amount of $4,050,000 in favor of M-Bank in April of 1985. The note was subsequently renewed, modified, and

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Eastern District of Louisiana, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public ad burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

extended through a series of agreements between M-Bank and Graff. Graff defaulted on the note, and M-Bank filed suit in state court seeking recovery of the balance due. In March of 1989, M-Bank was declared insolvent and the FDIC was appointed as its receiver. That same month, Bank One acquired the Graff note through a purchase and assumption agreement with the FDIC, as receiver for M-Bank, and intervened in the state court action. Graff filed an answer, counter-claim, and third-party petition against Bank One and the FDIC, as receiver for M-Bank. In his answer Graff asserted the affirmative defenses of waiver and estoppel. In his counter-claim and third-party petition he alleged violations of the Fair Debt Collection

Practices Act (FDCPA), common law unfair debt collection practices, and the Texas Deceptive Trade Practices Act (DTPA). The state court granted an interlocutory summary judgment for Bank One allowing recovery on the note, but did not dispose of Graff's claims. In September of 1989, the FDIC and Bank One removed the state court action to the United States District Court for the Northern District of Texas, Dallas Division. After removal, the FDIC and Bank One moved for summary judgment on Graff's claims, and the district court granted such motion. In July of 1991, the district court entered a final judgment and amended final judgment, adopting and finalizing both the interlocutory summary judgment allowing recovery on the note, and the

interlocutory summary judgment dismissing Graff's claims against Bank One and the FDIC. Graff appeals that judgment.

II. ANALYSIS

A. Affirmative Defenses

Graff contends that the district court erred in allowing Bank One to recover accrued interest on the promissory note because his affirmative defenses of waiver and estoppel bar recovery. Specifically, he alleges that he attempted to pay interest on the note, but that M-Bank representatives expressly instructed him not to pay such interest. By virtue of that instruction, Graff contends that M-Bank intentionally engaged in conduct that was inconsistent with its right to claim interest, and

thus waived its right to seek any interest due under the note. Graff also contends that M-Bank's same conduct equitable estops it from asserting its right to collect interest.

On the other hand, Bank One argues that Graff's defenses are barred both by the Supreme Court's opinion in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), and 12 U.S.C. § 1821(n)(4)(I). In D'Oench, as a defense to a collection suit, the borrower claimed that he had agreed with the failed bank that suit would not be brought to collect on a note. The Court barred the borrower from asserting that defense as a matter of public policy to protect the FDIC from misstatements regarding the genuineness of a bank's assets, and to prevent a bank

from padding its assets with spurious notes. The Court essentially held that a person dealing with an FDIC insured institution could not assert a claim or defense against the FDIC based on a secret side agreement with the bank if he lent himself, no matter how innocently, to a scheme which mislead the FDIC's examiners regarding the worth of the bank's assets.[3] See also Bowen v. FDIC,

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[3] Graff argues that even if the FDIC can avail itself of D'Oench, Bank One cannot do so. The applicable case law says otherwise. This court has held on numerous occasions that bridge banks and transferees from the FDIC may assert the defenses of D'Oench. FSLIC v. Griffin, 935 F.2d 692, cert. denied 112

915 F.2d 1013, 1016 (5th Cir. 1990) (application of the D'Oench holding is not dependent upon either the illegality of the unrecorded agreement or the fraudulent intent or bad faith of the borrower). Following the court's lead in D'Oench, Congress enacted 12 U.S.C. § 1821(n)(4)(I) (1990), which provides in pertinent part that a suit against a bridge bank based on an agreement that

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S.Ct. 1163 (1992); Bell & Murphy and Assoc., Inc. v. InterFirst Bank Gateway, 894 F.2d 750, 754 (5th Cir.), cert. denied, 111 S.Ct. 244 (1990). Consequently, Bank One, which acquired the note from the FDIC, as receiver for M-Bank, is entitled to the protections of D'Oench.

diminishes the bridge bank's interest in an asset acquired from a failed bank must (1) be in writing; (2) executed by the bank contemporaneously with the bank's acquisition of the asset; (3) approved by the board of directors or loan committee; and (4) from its inception have been an official bank record.

Graff's contention that his defenses of waiver and estoppel bar Bank One's recovery of interest due on the note is based on his assertion that M-Bank representatives expressly instructed him not to pay interest. If his contention is true, by agreeing not to pay interest, Graff lent himself to a scheme that mislead the FDIC and Bank One regarding the worth of the note held by M-Bank, because a note without interest is less

valuable than a note with interest. The alleged agreement to forego interest was not recorded, and there was no way for FDIC examiners to determine the existence of such an agreement. Accordingly, the principles of D'Oench bar Graff from asserting the alleged agreement as a defense to Bank One's recovery of interest due on the note. Likewise, § 1821(n)(4)(I) bars Graff from asserting the alleged agreement as a defense to recovery. The alleged agreement was not in writing, was not executed contemporaneously with M-Bank's acquisition of the note, was not approved by M-Bank's board of directors or loan committee, and from its inception was not an official M-Bank record. Simply put, the principles of D'Oench, Duhme, and 12

U.S.C. § 1821(n)(4)(I) bar Graff's affirmative defenses of waiver and estoppel to payment of the interest due on the note based on his oral and unrecorded agreement with M-Bank representatives.

B. Graff's Counter-Claims

1. Fair Debt Collection Practices Act

Graff contends that the district court erred in granting summary judgment to Bank One[4] and FDIC for his claims

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[4] Graff contends that Bank One is liable for M-Bank's alleged attempts to collect from his father. That contention is without merit. Bank One did not acquire those type of liabilities from the FDIC, as receiver of M-Bank, in the

under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et. seq. (FDCPA). Specifically, Graff alleges that he saw M-Bank personnel in his father's office and that his father told him that they attempted to pressure him into paying the amount due on the note. By communicating with his father, Graff contends that M-Bank violated the act, which essentially prohibits a debt collector from

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March, 1989 purchase agreement. Consequently, Bank One is not a proper party to Graff's claims for violations of common law unfair debt collection practices, the DTPA, or the FDCPA. Graff's alleged claims can lie, if at all, only against the FDIC, as receiver for M-Bank.

contacting a debtor's relatives or other third persons not liable as debtors or guarantors regarding payment of a debt.

Graff's contention is without merit. To assert a violation under the act the debtor must show that in connection with the collection of: (1) a debt; (2) a debt collector; (3) communicated with a person other than the debtor; and (4) the debtor suffered actual damages. See 15 U.S.C. § 1692c(b) and § 1692 K(a)(1)(2).

The act defines a "debt collector" as one "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due <u>another</u>." 15 U.S.C. § 1692a(6) (emphasis added). At the time M-Bank allegedly attempted to collect the amount due on the note from Graff's

father, it was attempting to collect as the owner of the note. One attempting to collect a debt owed to itself is not a "debt collector" under the Act. See Howe v. Readers Digest Ass'n Inc., 686 F. Supp. 461, 466-67 (S.D.N.Y. 1988). Since M-Bank was not a "debt collector," Graff's allegation fails to state facts sufficient to meet the requirements to bring suit under the act.

2. Common Law Unfair Debt Collection Practices

Graff contends that M-Bank personnel committed common law unfair debt collection practices by attempting to have Graff's father pay the amount due on the note. The only analogous cause of action under Texas law is a cause of action for unreasonable collection

efforts. To state a claim under this tort the borrower must show that the creditor attempted to collect a debt by waging a "campaign" of harassment and intimidation. Ware v. Paxton, 359 S.W.2d 897, 900 (Tex. 1962). Accordingly, trivial and isolated incidents are insufficient to allege a violation of the tort. But, the louder, nastier, more insulting, more threatening, and more offensive the creditor's actions are, the more likely it is that the court will find that the creditors' actions were unreasonable. See 46 Tex. L. Rev. 950, 959-60 (1968).

The only support for Graff's contention that M-Bank engaged in unreasonable collection efforts are his statements in his affidavit attached to

his motion opposing summary judgment. In that affidavit he stated: (1) that his father informed him that M-Bank personnel had threatened his father with legal action to pressure him into paying the debt; and (2) that he saw M-Bank personnel meeting with his father in his father's office.

An affidavit opposing a motion for summary judgment is required by Federal Rule of Civil Procedure 56(e) to set forth facts that would be admissible in evidence. See Buchanan v. Stanships, Inc., 744 F.2d 1070, 1073 (5th Cir. 1984). Hearsay statements in such affidavits are not entitled to be given any evidentiary weight by the court. Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539 (5th Cir. 1980), cert.

denied, 454 U.S. 927 (1981). The statement that Graff attributes to his father regarding M-Bank personnel attempting to pressure his father to pay the debt is hearsay under Federal Rule of Evidence 801(c) and is inadmissible to prove the truth of the matter asserted. Thus, disregarding Graff's hearsay affidavit testimony, the only evidence that remains for the court to consider regarding Graff's unreasonable collection efforts claim is his statement that he saw M-Bank personnel in his father's office. Assuming the truth of that statement, we have no evidence that the M-Bank personnel were attempting to collect the debt from his father, much less that they were unreasonably attempting to do so. Simply put, the

competent evidence tendered by Graff does not allege acts on the part of M-Bank personnel that rise to the level sufficient to state a claim under Texas common law for unreasonable collection efforts.[5]

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[5] Graff also asserts that M-Bank personnel violated the DTPA by attempting to collect the amount due on the note from his father. The lack of competent evidence tendered by Graff barring him from stating a claim for common law unfair debt collection practices, likewise bars him from stating a claim for DTPA violations.

III. CONCLUSION

For all of the above and foregoing reasons, the judgment of the district court is AFFIRMED.

EXHIBIT B

No. 89-481-D

DEPOSIT INSURANCE BRIDGE BANK, N.A. as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK DALLAS, N.A., Plaintiff,

VS.

STANLEY V. GRAFF, Defendant.

In the 95th Judicial District Court of Dallas County, Texas

INTERLOCUTORY SUMMARY JUDGMENT

On this day came on to be considered Plaintiff's Motion for Summary Judgment (the "Motion"), filed by Plaintiff Bank One Texas, N.A. (formerly known as Deposit Insurance Bridge Bank, N.A.) ("Bank One"), as Assignee of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A., in the

above-entitled and numbered cause. The Motion was filed on July 27, 1989 and the hearing was set for September 15, 1989. Defendant Stanley V. Graff ("Graff") timely filed his First Amended Original Answer, Original Counterclaim and Third-Party Petition and the matters asserted therein are before this Court. Although Graff timely received a copy of the Motion, he failed to file a response in a timely fashion. However, the Court granted leave for Graff to file his response and supporting affidavit. The Court, having reviewed the Motion, Brief in Support of Motion for Summary Judgment, the Affidavits of Ron Tomlin and William Frank Carroll, the Response and Affidavit of Graff and the other pleadings on file, and having considered

the law and the facts, is of the opinion that Bank One's Motion for Summary Judgment was made in the proper form and at the proper time, with proper service having been made, and further finds that the summary judgment evidence shows the absence of any genuine issue as to any material fact on the matters asserted in Plaintiff's Motion and that Bank One is entitled to judgment as a matter of law on the issues expressly set out in the Motion, and finds, pursuant to Tex. R. Civ. P. 166a, that Bank One's Motion for Summary Judgment should be granted in its entirety.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Bank One's Motion for Summary Judgment be, and the same is hereby GRANTED and it is ADJUDGED that

Bank One recover from Defendant Stanley V. Graff the principal sum of $4,022,738.00 together with accrued but unpaid interest on such sum in the amount of $638,645.62 as of September 15, 1989;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bank One shall recover from Defendant Stanley V. Graff its reasonable attorneys' fees in the amount of $8,250.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if this judgment is appealed by Graff to the Court of Appeals, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $7,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if Graff files an application for writ of error to the

Texas Supreme Court, on this judgment, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $3,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that if the application for writ of error is granted, but this judgment affirmed by the Texas Supreme Court, Bank One shall recover from Graff reasonable and necessary attorneys' fees in the amount of $2,500.00;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that costs of court are hereby awarded to Bank One;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of Bank One at the

maximum legal rate of ten percent (10%) per annum;

IT IS FURTHER ORDERED that still pending before this Court and part of this cause are the issues presented in Defendant Graff's Counterclaim and Third-Party Petition. The Court specifically finds that the matters raised therein were not raised in Plaintiff's motion and are likewise not addressed by this Judgment.

IT IS FURTHER ORDERED that upon this Judgment becoming final that Bank One have all writs of execution and other process necessary to enforce and collect this Judgment.

SIGNED this 18th day of September, 1989.

_____
David K. Brooks
JUDGE PRESIDING

JUDGE 191ST JUDICIAL
DISTRICT COURT SITTING
FOR JUDGE 95TH JUDICIAL
DISTRICT COURT OF DALLAS
COUNTY, TEXAS

APPROVED AS TO FORM:

BAKER, MILLS & GLAST, P.C.
500 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2916
(214) 220-8200

By: _____
William Frank Carroll
Bruce Collins

ATTORNEYS FOR PLAINTIFF

KOLODEY & THOMAS
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4713
(214) 953-0000

By: _____
Lindsey Vinson

ATTORNEYS FOR DEFENDANT

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

FINAL JUDGMENT

On this day came on for consideration the above referenced matter wherein BANK ONE, TEXAS, N.A. ("BANK ONE") (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.) and FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC"), are Plaintiffs and

Counter-Defendants and STANLEY V. GRAFF ("GRAFF") is Defendant and Counter-Plaintiff.

The Court has considered the evidence, the pleadings, affidavits, and official records in this cause, and finds that BANK ONE and FDIC are entitled to judgment against GRAFF. It is therefore

ORDERED that the Interlocutory Judgment entered by the 95th Judicial District Court of Dallas County, Texas on September 18, 1989 is hereby adopted by this Court and made final, such that BANK ONE recover from GRAFF judgment in the principal amount of $4,022,738.00 and interest to the date of judgment in the amount of $1,486,758.47;

IT IS FURTHER ORDERED that BANK ONE shall recover from GRAFF its reasonable

attorneys' fees in the amount of $16,612.00;

IT IS FURTHER ORDERED that all claims asserted by GRAFF in his First Amended Original Answer, Original Petition and Third-Party Petition against FDIC and BANK ONE are hereby dismissed with prejudice;

IT IS FURTHER ORDERED that all sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of BANK ONE at the rate of _____ percent per annum;

IT IS FURTHER ORDERED that all costs of court are hereby awarded to BANK ONE and FDIC; and

IT IS FURTHER ORDERED that BANK ONE shall have all writs of execution and

other process necessary to enforce this judgment when it becomes final.

SIGNED this 23rd day of July, 1991.

_____

UNITED STATES DISTRICT JUDGE

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

AMENDED FINAL JUDGMENT

By order dated July 23, 1991, the Court entered Final Judgment in the above-styled and numbered case. The amount of post-judgment interest was inadvertently omitted from the court's order. Accordingly, the Court, sua

sponte, amends said Final Judgment as follows:

> All sums awarded herein from the date of judgment until paid, including court costs, shall bear interest in favor of Bank One at the rate of 6.39% per annum.

All other provisions of the Final Judgment entered herein on July 23, 1991, remain in full effect.

IT IS SO ORDERED this 26th day of July, 1991.

ROBERT W. PORTER
SENIOR UNITED STATES
DISTRICT JUDGE

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1887

BANK ONE, TEXAS, N.A., (f/k/a DEPOSIT INSURANCE BRIDGE BANK, N.A.), as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for MBANK DALLAS, N.A., ET AL,
Plaintiffs-Appellees,

versus

STANLEY V. GRAFF,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(June 11, 1992)

Before GARWOOD, and DeMOSS, Circuit Judges, and SCHWARTZ, District Judge.[6]

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

---

[6] Senior District Judge for the Eastern District of Louisiana, sitting by designation.

EXHIBIT F

No. 89-481-D

DEPOSIT INSURANCE BRIDGE BANK, N.A. as Assignee of the FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK DALLAS, N.A., Plaintiff,

VS.

STANLEY V. GRAFF, Defendant.

In the 95th Judicial District Court of Dallas County, Texas

FIRST AMENDED ORIGINAL ANSWER, ORIGINAL COUNTERCLAIM AND THIRD-PARTY PETITION

Defendant Stanley V. Graff ("Graff") files this first amended original answer, original counterclaim and third-party petition as follows:

Original Answer

General Denial

1. Graff denies each and every, all and singular, the allegations

contained in Plaintiff's Original Petition and demands strict proof thereof.

Affirmative Defenses

2. Plaintiff has waived its right to seek all amounts allegedly due under the promissory note at issue in this litigation or at least has waived its right to seek all interest due under the promissory note at issue in this litigation.

3. By its conduct and the conduct of its assignor, Plaintiff is equitably estopped from recovering all amounts allegedly due under the promissory note or at the least recovery of all interest allegedly due under the promissory note at issue in this litigation.

Counterclaim

Count One - Unfair Debt Collection Practices

4. The conduct of Plaintiff and/or the conduct of Plaintiff's assignor, specifically Plaintiff's and Plaintiff's assignor's contact with relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, constitutes statutory and common law unfair debt collection practices and have proximately caused Graff damage in excess of the minimum jurisdictional limits of this Court for which Graff now sues.

Count Two - Deceptive Trade Practices

5. The conduct of Plaintiff and/or the conduct of Plaintiff's assignor,

specifically Plaintiff's and Plaintiff's assignor's contact with relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, violates the Texas Deceptive Trade Practices Act, Section 17.41, et seq., by at least:

5.01 Plaintiff's use or employment of false, misleading or deceptive acts or practices proscribed in Section 17.46 of the Act including, but not limited to the following:

(a) By representing the agreements conferred or involved rights, remedies or obligations which they did not have or involve;

(b) By failing to disclose information concerning goods or services at the time of the transaction, such failure being intended to induce Graff into a transaction into which Graff would not have entered into had the information been disclosed;

5.02 Plaintiff has engaged in an unconscionable course of action.

Count Three - Attorneys' Fees

6. As a result of the conduct of Plaintiff as described above, it has been necessary for Graff to retain the services of the undersigned attorneys to prosecute this counterclaim. Pursuant to the Deceptive Trade Practices Act, Graff is entitled to recover his reasonable and

necessary attorneys' fees for the services rendered for which he now sues.

Third-Party Petition

Graff, as third-party Plaintiff, files this third-party petition complaining of the Federal Deposit Insurance Corporation, as Receiver for MBank Dallas, N.A. ("FDIC) as follows:

Count One - Unfair Collection Practices

7. The conduct of FDIC and/or of MBank Dallas, N.A., specifically contacting relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, constitutes statutory and common law unfair debt collection practices and have proximately caused Graff damage in excess

of the minimum jurisdictional limits of this Court for which Graff now sues.

Count Two - Deceptive Trade Practices

8. The conduct of the FDIC and/or MBank Dallas, N.A., specifically contacting relatives and others not liable as debtors or guarantors on this debt concerning the alleged indebtedness and the financial condition of Graff, violates the Texas Deceptive Trade Practices Act, Section 17.41, et seq., by at least:

8.01 The use or employment of false, misleading or deceptive acts or practices proscribed in Section 17.46 of the Act including, but not limited to the following:

(a) By representing the agreements conferred or involved rights, remedies or obligations which they did not have or involve;

(b) By failing to disclose information concerning goods or services at the time of the transaction, such failure being intended to induce Graff into a transaction into which Graff would not have entered into had the information been disclosed;

8.02 The conduct constitutes an unconscionable course of action.

Count Three - Attorneys' Fees

9. As a result of the conduct as described above, it has been necessary

for Graff to retain the services of the undersigned attorneys to prosecute this counterclaim. Pursuant to the Deceptive Trade Practices Act, Graff is entitled to recover his reasonable and necessary attorneys' fees for the services rendered for which he now sues.

Prayer for Relief

WHEREFORE, Graff prays for relief as follows:

1. That Plaintiff take nothing by reason of its suit against Graff;

2. That Graff be awarded damages against Plaintiff as alleged in his counterclaim;

3. That Graff be awarded his damages against the FDIC as alleged in his third-party petition;

4. For attorneys' fees;

5. For costs of court; and

6. For such other and further relief, both general and special, at law and in equity, to which he may show himself entitled.

Respectfully submitted,

KOLODEY & THOMAS
2300 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4713
(214) 53-0000

By: _____
Lindsey Vinson
TX Bar No. 20590400

ATTORNEYS FOR
STANLEY V. GRAFF

Certificate of Service

This is to certify that a true and correct copy of the foregoing instrument was forwarded in the United States Mail, postage prepaid, to William Frank Carroll, Baker, Mills & Glast, P.C., 500 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2916 on this 1st day of September, 1989.

_____

Lindsey Vinson

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DEPOSIT INSURANCE BRIDGE BANK, N.A., AS ASSIGNEE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A., AND FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK DALLAS, N.A.,
Plaintiffs,

VS.

STANLEY V. GRAFF,
Defendant.

CIVIL ACTION NO. CA 3-89-2376-F

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

This is a suit to collect on a promissory note. Before the Court is the plaintiffs' motion for summary judgment, filed on May 1, 1990, wherein plaintiffs

Bank One, Texas, N.A. ("Bank One"),[7] formerly known as the Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"),[8] and the Federal Deposit Insurance Corporation ("FDIC"), as Receiver of MBank Dallas, N.A. ("MBank"), move the Court for a summary disposition of all claims asserted by the defendant Stanley V. Graff ("Graff") in his First Amended Original Answer, Original Counterclaim

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[7] Bank One acts, in this lawsuit, in its capacity as assignee of the FDIC as Receiver for MBank Dallas, N.A.

[8] Effective July 12, 1989, the name of Bridge Bank was changed to Bank One. The Notice of this name change was filed in the state court action, before removal to federal court.

and Third Party Petition. After careful review of the arguments, authorities, and affidavits presented by the parties, the Court is of the opinion that the plaintiffs' motion should be in all things GRANTED.

FACT SUMMARY

On January 11, 1989, MBank filed its original petition in the 95th Judicial District Court of Dallas County, Texas, seeking recovery on a certain deed of trust promissory note (the "note") executed by Stanley V. Graff in favor of MBank Grand Prairie on April 22, 1985, in the amount of four million fifty thousand dollars ($4,050,000.00).[9] The note was

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[9] The promissory note upon which the plaintiffs sue is a negotiable

instrument under Texas law. Recovery on such an instrument is governed by TEX. BUS. & COMM. CODE ANN. section 3.307(b) (Vernon 1968). Under section 3.307(b), the plaintiffs must prove that (1) the note was executed by Graff; (2) Bank One is the present holder of the note; and (3) that the note has been introduced into evidence. See, e.g., Anderson v. Industrial State Bank, 478 S.W.2d 215. 217 (Tex. Civ. App. - Houston [14th Dist.] 1972, writ ref'd n.r.e.).

Additionally, the Court notes that pursuant to TEX. BUS. & COMM. CODE ANN. section 3.307(a) (Vernon 1968), Texas law deems each signature on an instrument admitted, unless specifically denied. Graff has not specifically

for business purposes, and not for personal, family, or household purposes.

Although originally for a two-year term, the note was repeatedly renewed and extended through approximately July of 1988, by way of a series of 90-day notes.[10] In June of 1988, Graff met with MBank personnel concerning the continuing 90-day extensions of his debt. Bank personnel requested additional collateral from Graff. No mutually satisfactory resolution of the matter of Graff's indebtedness could be reached between Graff and MBank.

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denied his signature on the note.

[10] See Modification and Extension of Real Estate Note and Lien, dated May 20, 1988, executed by Stanley V. Graff.

On March 28, 1989, the Comptroller of the Currency declared MBank to be insolvent, closed MBank pursuant to Title 12 U.S.C. sections 191 and 1821(c), and appointed the FDIC as Receiver for MBank and the Bridge Bank (later Bank One) entered into a Purchase and Assumption Agreement whereby all loans of the MBank Receivership, and selected liabilities of the MBank Receivership, were transferred to the Bridge Bank, including Graff's note. Under Article II of the Purchase and Assumption Agreement, the liabilities arising from claims based on the actions of the failed MBank or its employees were not assumed by the Bridge Bank but, rather, retained by the FDIC as Receiver for MBank.

Before removal to federal court, the state trial court granted an Interlocutory Summary Judgment in favor of Bank One on the note. The Interlocutory Judgment did not dispose of Graff's counterclaims for unfair debt collection practices, violations of the Texas Deceptive Trade Practices Act and attorneys' fees.

STANDARD FOR THE GRANTING OF SUMMARY JUDGMENT

The standard for the granting or denial of a motion for summary judgment is well-settled and need not be reiterated here at length. The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986); Reese v. Anderson, 926 F.2d 494, 498 (5th Cir. 1991).

The district court should grant the movant's motion for summary judgment if it determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). A material fact is one that might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

S.Ct. 2505 (1986). In the present case, the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), makes clear that the fact issues raised by Graff are not material.

COMPETENCY OF THE AFFIDAVITS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The affidavits of David Eisenstark,[11] Ron Tomlin,[12] and Wilton

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[11] David Eisenstark is employed by the FDIC in the capacity of bank Liquidation Specialist. His job entails administrative responsibilities pertaining to claims and litigation against the FDIC as Receiver of MBank, Dallas N.A.

[12] Ron Tomlin is employed by Bonnet Resources Corporation, as Agent for Bank One, Texas, N.A. formerly known as Deposit Insurance Bridge Bank, N.A.,

D. Page[13] support the Plaintiffs' Motion for Summary Judgment. Graff challenges the competency of the affidavits as summary judgment evidence contending that each is substantially deficient because it contains conclusory assertions of personal knowledge. The Court rejects

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Assignee of the FDIC, as Receiver for MBank, Dallas, N.A. as a Senior Vice-President. Tomlin held this same position with Bank One and MBank Dallas, N.A. (successor to MBank Grand Prairie).

[13] Wilton D. Page is employed by Bank One, Texas, N.A., formerly known as Deposit Insurance Bridge Bank, N.A., Assignee of the FDIC, as Receiver for MBank, Dallas, N.A., as a cashier. Page held this same position with Bank One's predecessor in interest, MBank, Dallas, N.A., (successor to MBank Grand Prairie).

this argument. The Court finds the affidavits of David Eisenstark, Ron Tomlin, and Wilton D. Page to be competent evidence within the meaning of Laborers' International Union v. United States Department of Justice, 578 F.Supp. 52, 56 (D.C. D.C. 1983) aff'd without opinion, 748 F.2d 714 (D.C. Cir. 1984).

GRAFF'S COUNTERCLAIMS

Graff alleges that the conduct of the FDIC and Bank One in contacting Graff's relatives, and others not liable as debtors or guarantors on Graff's debt, constitutes unfair debt collection practices.[14] He further alleges

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[14] Specifically, Graff contends that representatives of MBank approached his father regarding paying off Graff's

violations of the Texas Deceptive Trade Practices Act, Sec. 17.41 et seq., by the plaintiffs and seeks attorney fees on his counterclaims.

I. Unfair Debt Collection Practices: Graff's Statutory and Common Law Claims and the Application of the Doctrine of D'Oench, Duhme & Co. to the Present Case

In his counterclaim, Graff asserts claims against the FDIC and Bank One for "statutory and common law unfair debt

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debt. (Affidavit of Stanley V. Graff in Opposing Motion for Summary Judgment, page 3). The plaintiffs deny that they contacted Graff's relatives, or anyone else not liable on that note, regarding Graff's indebtedness. The Court declines to strike the Graff affidavit from the summary judgment papers before it.

collection practices." While Graff has failed to specify the statutory provisions under which he seeks relief, it appears that Graff has attempted to state a statutory claim for unfair debt collection practices under the "Fair Debt Collection Practices Act," Title 15 U.S.C., section 1692. The Court finds that Graff has failed to properly state such a claim.

Even if Graff had properly stated such a statutory claim, his recovery under this statute would be barred because the purpose for which the loan was made to Graff is outside the scope of the statute. It is undisputed that the loan made to Graff was for business purposes, and not for personal, family, or household purposes, and thus does not

constitute a "debt" within the meaning of Title 15 U.S.C. section 1692a(5). Thus, any claim by Graff asserting a violation of Title 15 U.S.C., section 1692 is barred.

In evaluating Graff's "common law" counterclaim for unfair debt collection practices, the Court must examine the applicability of the D'Oench, Duhme doctrine to this case. The D'Oench, Duhme doctrine is a rule of estoppel that prevents those who give notes to federally-insured institutions from raising defenses based on alleged side agreements made with the officers of failed banks with regard to enforceability of promissory notes. See FSLIC v. Murray, 853 F.2d 1251, 1255 (5th Cir. 1988). The rationale underlying the

doctrine is that federal banking authorities must be able to enforce notes in accordance with their written terms, even in the face of wrongdoing by a failed bank, in order to ensure the smooth administration of bank insurance and to avoid panic. See e.g., Langley v. FDIC, 484 U.S. 36, 91 (1987); FSLIV v. Hsi, 657 F.Supp. 1333, 1338 (E.D. La. 1986).

The D'Oench, Duhme doctrine has been extended beyond the limited situation in which the lender and borrower secretly agree that an obligation will not be enforced. It has been used to bar nearly every defense raised by the maker of a note against the FDIC and the FSLIC. See e.g., FSLIC v. Murray, 853 F.2d 1251, 1255 (5th Cir. 1988) (barring the defense

of fraud); FSLIC v. Lafayette Investment Properties, Inc., 855 F.2d 196, 198 (5th Cir. 1988) (barring the defense of fraud; FDIC v. McClanahan, 795 F.2d 512, 516-17 (5th Cir. 1986) (barring the defense of failure of consideration or fraud in the inducement); FDIC v. Investors Associates X., Ltd., 775 F.2d 152, 155 (6th Cir. 1985) (barring all defenses arising out of fraudulent scheme); FDIC v. Van Laanen, 769 F.2d 666, 667 (10th Cir. 1985) (barring oral side agreements); FDIC v. Vestring, 620 F.Supp. 1271, 1273-74 (D.C. Kan. 1985) (barring fraud in the inducement).

While a genuine, disputed issue of fact is presented in this case regarding whether MBank personnel engaged in unfair debt collection practices, the Court

concludes, in light of the case law discussed above, that this fact issue is immaterial under the applicable law. Even if proven, Graff's claim of unfair debt collection practices by the plaintiffs is barred as a defense to his liability on the note by D'Oench, Duhme and its progeny.

II. Graff's Counterclaim for Violations of the Texas Deceptive Trade Practices Act

To recover under the Texas Deceptive Trade Practices Act ("DTPA"), the plaintiff must be a consumer, as defined by the DTPA, who procured a good or service, as defined by the DTPA. TEX. BUS. & COMM. CODE ANN. sections 17.45(1), 17.45(2) (Vernon 1987). The loaning of money is not a "service" within the meaning of the DTPA. See e.g., Riverside

Nat'l Bank v. Lewis, 603 S.W.2d 169, 174-5 (Tex. 1980). Because Graff is not a consumer within the meaning of the DTPA, he lacks standing to assert this counterclaim.

III. Graff's Claim for Attorneys' Fees Incurred in the Prosecution of his Counterclaims

Graff seeks attorneys' fees on his counterclaims against the FDIC and Bank One. Under the reasoning and analysis of Judge Edith Jones as set forth in Interfirst Bank Abilene, N.A. v. Federal Deposit Insurance Corporation, 777 F.2d 1092, 1097 (5th Cir. 1985), the Court rejects Gaff's request for attorneys' fees because the claimed fees "run afoul of the requirement that the assets of a failed bank be ratably distributed among the bank's creditors holding approved or

adjudicated claims." See also Title 12 U.S.C. section 194.

In sum, the plaintiffs have met their summary judgment burden of proof and Graff has failed to produce evidence that a genuine issue of material fact exists requiring resolution by the fact-finder. Accordingly, the Court concludes that this case is appropriate for disposition by summary judgment.

Plaintiffs have established that Graff executed the note,[15] that Graff has failed to pay the note according to its terms, that Bank One is the holder, owner, and possessor of the note, and is

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[15] See page 4, paragraph 6 of the parties' Joint Pretrial Order, filed June 4, 1990.

entitled to judgment, including reasonable attorneys' fees, costs of court and post-judgment interest. Accordingly, Plaintiffs' motion for Summary Judgment of May 1, 1990 is GRANTED.

By separate order, a final judgment shall be entered against Graff and in favor of the FDIC and Bank One on all claims asserted by Graff in his First Amended Original Answer, Original Counterclaim and Third Party Petition. In addition, the previous Interlocutory Judgment granted by the 95th Judicial District Court, Dallas County, Texas, Cause No. 89-481-D, against Graff and in favor of Bank One, shall be made final. The Court declines to award prospective attorneys' fees with regard to any appeal

to the Fifth Circuit, or to the Supreme Court, of its judgment in this case.

The plaintiffs shall, within fifteen (15) days of the file-stamped date of this order, submit a proposed final judgment to the Court, including affidavits in support of the amounts claimed in attorneys' fees for the prosecution of this suit.

The merits of this case having been decided, the above-styled and numbered cause is hereby **ADMINISTRATIVELY CLOSED** and removed from this Court's docket of pending cases.

SO ORDERED this 18th day of June, 1991.

ROBERT W. PORTER
SENIOR UNITED STATES
DISTRICT JUDGE

No. 92-428

DEC 9 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

STANLEY V. GRAFF, PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J. T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
Senior Counsel

JEROME A. MADDEN
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the bar on enforcement against federal bank regulators of secret side agreements made with the failed bank, established by this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), precludes petitioner's argument that he was not obligated to make payments on a facially enforceable promissory note because representatives of the failed bank instructed him not to do so.

2. Whether officials of the failed bank were "debt collector[s]" for purposes of 15 U.S.C. 1692a(6).

3. Whether the district court erroneously relied on affidavits in granting summary judgment against petitioner on his claims of unfair debt-collection practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-428

STANLEY V. GRAFF, PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is unpublished, but the judgment is noted at 963 F.2d 371 (Table). The opinion of the district court (Pet. App. 49-69) and a related opinion issued by the Texas state court before the case was removed to federal court (Pet. App. 22-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1992. A petition for rehearing was denied on June 11, 1992. Pet. App. 36-37. The petition for a writ of certiorari was filed on September 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1985, petitioner executed a promissory note in favor of MBank Grand Prairie for $4,050,000 to finance a real estate purchase. When petitioner failed to make payments in accordance with the terms of the note, MBank Dallas, N.A. (an affiliated entity to whom the note had been negotiated) sued petitioner in a state district court in Dallas County, Texas, seeking the balance due. In March 1989, the Office of the Comptroller of the Currency declared MBank Dallas insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Pursuant to a Purchase and Assumption Agreement between the FDIC in its capacity as receiver and the Deposit Insurance Bridge Bank, N.A. (later renamed Bank One, Texas, N.A.), Bank One acquired certain assets of MBank Dallas, including the note in question. Bank One intervened in the state-court action and moved for summary judgment. Petitioner responded by asserting affirmative defenses of waiver and estoppel, based on allegations that representatives of MBank had instructed him not to make payments on the note. He also asserted counterclaims based on alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (FDCPA), as well as common-law unfair debt collection claims, relying on the allegation that officials of MBank approached his father and asked him to pay amounts due under the note. Pet. App. 4-6, 15, 38, 50-55.

2. On September 18, 1989, the state district court granted an interlocutory summary judgment for Bank One, holding petitioner liable on the note, but refraining from disposition of petitioner's counterclaims. Pet. App. 22-29.

3. The FDIC and Bank One subsequently removed the case to the United States District Court for the Northern District of Texas and moved for summary judgment on petitioner's counterclaims. In June 1991, the district court granted summary judgment for respondents, rejecting petitioner's counterclaims. Pet. App. 49-69. The court first rejected petitioner's claim under the FDCPA (*id.* at 61-62) based on its view that the loan was for business purposes, rather than for personal, fam ily, or household purposes. See 15 U.S.C. 1692a(5) (limiting the definition of "debt" under the FDCPA to loans "primarily for personal, family, or household purposes"). The court rejected the common-law debt-collection claims (Pet. App. 62-65) as barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). On July 23, 1991, the district court formally adopted the Texas state court's judgment on Bank One's claim against petitioner. Pet. App. 30-33.

4. The court of appeals affirmed. Pet. App. 3-21. The court rejected petitioner's defenses to payment of the note as barred both by this Court's decision in *D'Oench, Duhme*, and by its statutory progeny, 12 U.S.C. 1823(e) (1988 & Supp. III 1991) and 12 U.S.C. 1821(n)(4)(I) (Supp. III 1991). The court explained that petitioner's contention that MBank officials instructed him not to make interest payments would establish that he "lent himself to a scheme that mislead [*sic*] the FDIC and Bank One regarding the worth of the note held by M-Bank, because a note without interest is less valuable than a note with interest. The alleged agreement to forego [*sic*] interest was not recorded, and there was no way for FDIC examiners to determine the existence of such an agreement." Pet. App. 11-12. Accordingly, the court concluded that petitioner's defenses were barred.

The court also affirmed the district court's grant of summary judgment on the FDCPA claim. Pet. App. 15-16. The court noted that the FDCPA applies only to a person who "collects or attempts to collect * * * debts owed or due * * * [to] another." 15 U.S.C. 1692a(6). Because MBank owned the note at the time its representatives were alleged to have attempted to collect from petitioner's father, summary judgment on the FDCPA claim was appropriate.

Finally, the court affirmed the district court's grant of summary judgment on the common-law debt-collection claims. Pet. App. 16-20. The court noted that petitioner had proffered no admissible evidence that MBank personnel attempted to collect the debt from petitioner's father, "much less that they were unreasonably attempting to do so." *Id.* at 19. Hence, the court concluded, petitioner's allegations did "not allege acts * * * that rise to the level sufficient to state a claim under Texas common law for unreasonable collection efforts." *Id.* at 20.

ARGUMENT

1. Petitioner first argues (Pet. 24-36) that the court of appeals erred in applying *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), to bar his defenses of waiver and estoppel. The substance of his argument is that *D'Oench, Duhme* bars only secret agreements, and that this case does not involve a secret agreement, but instead a "direct *instruction* from a banking officer to a borrower," Pet. 28. Petitioner's argument is meritless.

In *D'Oench, Duhme*, this Court refused to allow a borrower sued by the FDIC on a note it acquired as receiver of a failed bank to assert as a defense the claim that the note was given "with the understanding that no suit would be brought thereon." 315 U.S. at 456. The Court

adopted a federal common-law rule allowing federal banking regulators to enforce notes in the face of certain defenses not apparent on the face of the note, relying on the need of regulators to determine the "genuineness of assets ostensibly held by a bank." *Id.* at 460. The Court explained that the doctrine would bar a maker's defenses whenever "the maker lent himself to a scheme or arrangement whereby the banking authority * * * was likely to be misled." *Ibid.*[1] As the court of appeals noted, petitioner's allegation that he was directed not to pay

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[1] Congress supplemented *D'Oench, Duhme* by enacting 12 U.S.C. 1823(e) (1988 & Supp. III 1991), which provides that no "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it * * * shall be valid against the [FDIC] unless such agreement * * * is in writing, [signed by the bank and contained in the bank's official records]." Congress extended the same protections to bridge banks like respondent Bank One in 12 U.S.C. 1821(n)(4)(I) (Supp. III 1991). Petitioner contends (Pet. 35-36 & nn. 34-35) that Section 1821(n)(4)(I) does not apply to this case because it was enacted after the note was transferred to Bank One. Because the judgment of the court of appeals rested alternatively on the common-law principles articulated in *D'Oench, Duhme* and the statutory bar set forth in Section 1821, the question whether Section 1821 applies retroactively would not be squarely presented unless the Court concluded that the common-law principles articulated in *D'Oench, Duhme* were inadequate to support the judgment. Petitioner does not suggest that the statutory provisions have preempted *D'Oench, Duhme*'s common-law rule, see *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991) (12 U.S.C. 1823(e) is "an adjunct" to *D'Oench, Duhme*), cert. denied, 112 S. Ct. 1163 (1992), and also does not question that *D'Oench, Duhme*'s protections are available not only to the FDIC, but also to subsequent holders like respondent Bank One, see *Bell & Murphy & Assocs.* v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750, 754-755 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990); *FDIC* v. *Newhart*, 892 F.2d 47, 50-51 (8th Cir. 1989).

interest on the note would establish that petitioner lent himself to an arrangement likely to mislead banking regulators about the value of the note. Petitioner cites no support for his contention that he can evade the rule of *D'Oench, Duhme* simply by characterizing the bank officer's alleged statement as an instruction (on which he relied, and with which he apparently agreed) rather than a mutual agreement. Such a rule would eviscerate the holding in *D'Oench, Duhme* by placing control over its application squarely in the hands of the borrowers against whom the doctrine is directed. Accordingly, there is no basis for review of petitioner's *D'Oench, Duhme* claim.[2]

2. Petitioner next argues (Pet. 37-44) that the Fifth Circuit erred in granting summary judgment on his claim under the FDCPA even though the district court believed there was a fact question as to whether MBank engaged in activity that constituted unfair debt collection practices proscribed by the FDCPA. The problem with that argument, however, is that it ignores the court of appeals' conclusion that the MBank employees were not covered by the FDCPA because they were collecting

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[2] For that reason, petitioner's argument (Pet. 26) that the court of appeals' analysis of the *D'Oench, Duhme* claim deprived him of due process and his right to trial by jury is meritless. The decision in *D'Oench, Duhme* predated execution of the note by more than four decades. Petitioner's failure to familiarize himself with its requirements before relying on the bank officer's alleged oral representations does not raise a serious constitutional question. See *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). Nor did the district court deprive petitioner of his right to trial by jury when it determined that a trial was unnecessary because there were no genuine issues of material fact under the relevant legal principles.

a debt of MBank itself, rather than the debt of "another." Because the employees therefore were not "debt collector[s]" within the meaning of 15 U.S.C. 1692a(6), petitioner's claim under the FDCPA necessarily fails, without regard to whether the activities of the employees otherwise would have violated the FDCPA.

To the extent petitioner addresses the reasoning of the court of appeals (Pet. 42-44), he offers only the fact-specific contention that respondents failed to satisfy their burden of proving that MBank was the owner of the note at the time of the collection activities. That contention, however, ignores the fact that it was petitioner, and not respondents, who raised the FDCPA claim and thus had the burden of proof. In order to defeat summary judgment on that claim, petitioner was obligated to offer materials from which the court could discern a genuine issue of material fact as to whether MBank was collecting the debt of another. But petitioner never even alleged that MBank was not the owner of the note at the time. Instead, he has simply argued that respondents failed to offer conclusive evidence of MBank's ownership. Petitioner offers nothing to suggest that the court of appeals' treatment of this matter raises a question of general legal significance.[3]

3. Finally, petitioner argues (Pet. 45-59) that the district court erred in granting summary judgment on the unfair debt-collection claims because respondents failed adequately to establish that the individuals who submitted certain affidavits on behalf of respondents had per-

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[3] Moreover, he offers nothing to suggest error in the district court's dismissal of the claim as barred because the note did not represent a "debt" for purposes of 15 U.S.C. 1692a(5).

sonal knowledge of the matters stated in the affidavits. Those affidavits, however, were not relevant to the judgment of the court of appeals, which rested not on the sufficiency of respondents' factual submissions, but on the legal conclusions that (a) petitioner's FDCPA claim failed because MBank was collecting its own debt; and (b) petitioner's common-law claim failed because he did not allege acts of sufficient egregiousness to state a cause of action. Pet. App. 15-20. Petitioner acknowledges that the Fifth Circuit did "not even address [petitioner's] contention that the affidavits of Bank One and FDIC-Receiver are legally and substantively deficient." Pet. 54. Because the court of appeals had no occasion to consider petitioner's claim, it is not suitable for review in this Court. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). In any event, petitioner offers no issue of general significance in his contention that the affiants in this case did not have sufficient personal knowledge to justify the district court's decision to credit their affidavits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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